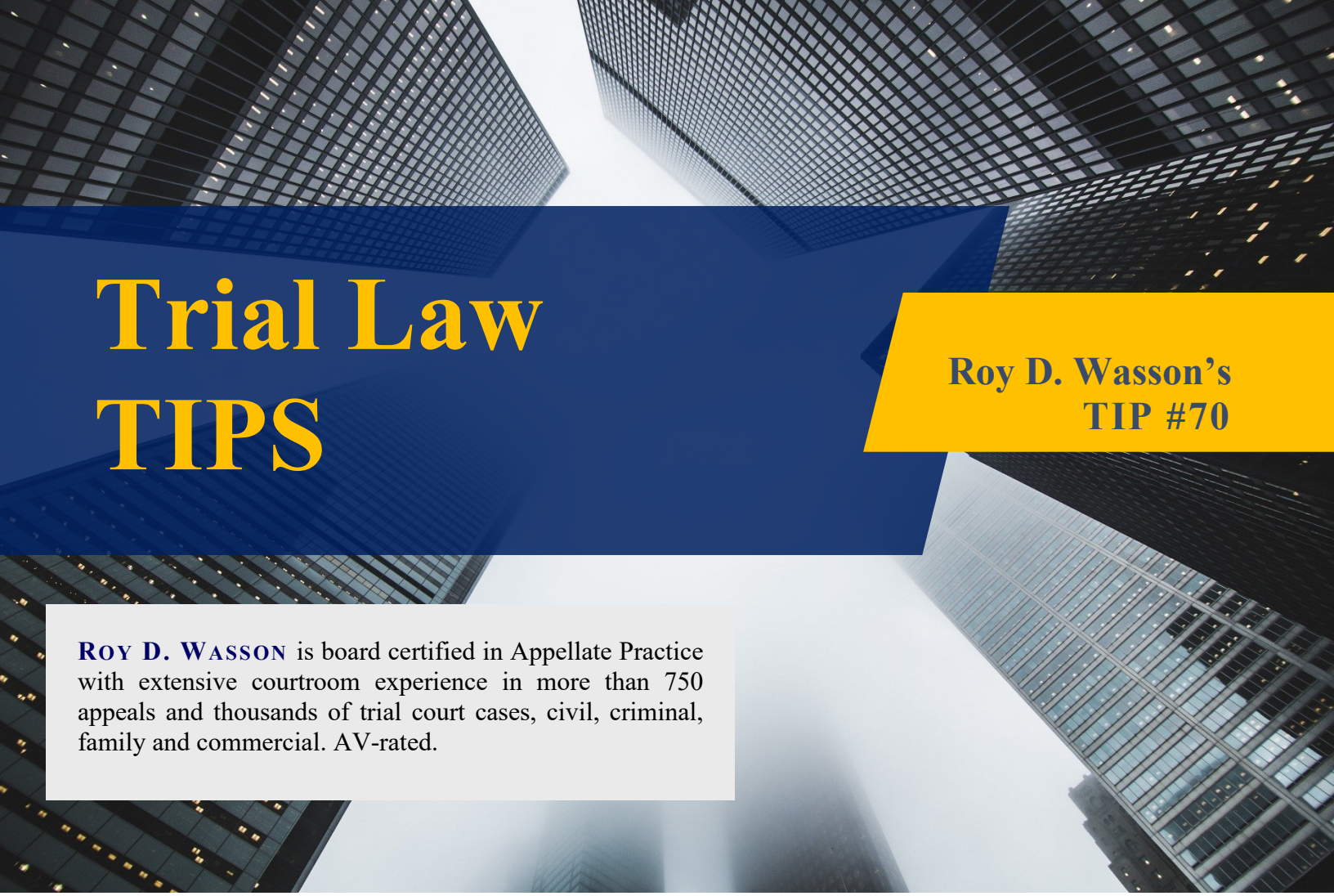

Trial Law TIPS

Roy D. Wasson's TIP #70

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Use of an Expert Deposition Without Qualifying Expert

Can you (or the defense attorney) read an expert witness' deposition at trial (or play the expert's video depo) without providing any testimony about the expert's qualifications? A line of cases dating back 44 years, that has never been overruled or disapproved, permits just that: expert testimony without qualifying the expert. If the party opposing the expert does not raise the failure of the proponent to qualify the expert during the deposition, the deposition will be admissible, and the objection will be deemed waived.

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Objections To Qualifications Like Objections to Form– Waivable

Several cases have dealt with the situation in which a party engaging an expert has taken the expert's deposition, without asking the expert anything about his or her education, training, or experience. At trial, the party taking the expert deposition has offered the testimony into evidence and the opposing party has objected on the understandable ground that there was no proof that the expert was qualified in the field of his or her testimony. Such objections have been uniformly disallowed as waived, if not initially raised during the expert's deposition.

The Third DCA addressed the situation in an appeal in which the defendant appealed a judgment for the plaintiff in an motor vehicle negligence case in which the plaintiff had presented to the jury the deposition testimony of his accident reconstruction experts, who were not asked about their qualifications at the time of the depositions. The court held as follows:

> Specifically, defendants contend that the court committed prejudicial error in allowing both officers to testify as experts for three reasons, all of which were asserted upon repeated objections raised at trial: (1) Plaintiffs did not make a sufficient showing that the witnesses met the necessary criteria of expertise in the area of accident reconstruction; (2) The officers' opinions were based on data which was insufficient to substantiate their conclusions; and (3) No proper predicate in the form of hypothetical questions was laid for the officers' opinion testimony.
>
> * * *
>
> If defendants had raised objections at the time of deposition on the grounds stated in their

> in-court objections and in this appeal, plaintiffs might have been able to obviate or cure any alleged deficiencies by offering greater proof of the officer's competency as an expert, by probing for additional data to support his conclusions, or by framing appropriate hypotheticals, if indeed such hypotheticals were necessary. The purpose of the rule is to give a party just such opportunities and to avoid undue dissension at trial. Since the required objections were not timely raised, defendants will not be allowed to profit by their own omissions, and we find no prejudicial error in the admission of this witness' deposition. Florida Rule of Civil Procedure 1.330(d)(3)(A) and (B); Evans v. Perry, 161 So.2d 27 (Fla. 2d DCA 1964).

Quinn v. Millard, 358 So. 2d 1378, (Fla. 3d DCA 1978)(emphasis added).

This line of cases traces its origin to the Rule of Civil Procedure dealing with objections to the "form" of questions. Many trial lawyers oversimplify that rule and believe that it only requires objections to the form of questions to be made at the time of the deposition, allowing all other objections to be made at trial. The rule actually requires objections to anything that could be cured at the time of taking the deposition, not just objections to the form of the question.

> Fla. R. Civ. P. 1.330(d)(3) provides:
>
> (d) *Effect of Errors and Irregularities.*
>
> (3) *As to Taking of Deposition.*
>
> (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the

> deposition ***unless the ground of the objection is one that might have been obviated or removed if presented at that time.***
>
> (B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties ***and errors of any kind that might be obviated, removed, or cured if promptly presented are waived unless timely objection to them is made*** at the taking of the deposition.

(Emphasis added).

Note that the qualifications of an expert witness may mean something different than the "competency of a witness." However, even if "competency" can be read to include the qualifications of an expert, the failure to ask the expert about his or her qualifications at the time of the deposition is certainly a "ground of the objection . . . that might have been obviated or removed if presented at that time." Subsection (d)(3)(A) does not permit litigants to wait until trial to raise an objection to the qualifications of a deposed expert.

The *Quinn* case has been cited with approval in cases including *Clair v. Glades County Board of Comm'rs*, 635 So. 2d 84 (Fla. 1st DCA 1994). The First DCA in *Clair* affirmed the judgment for the Employer/Carrier in a Workers Compensation case in which the E/C had introduced the deposition of an expert whose lack of qualifications was not raised by the Claimant at the time of the deposition. The court held as follows:

> In the case at bar, the E/C failed to show that either Dr. Conant or Dr. Arpin was qualified to testify in the area of chiropractic medicine, as neither physician was asked a single question about his or her "knowledge, skill, experience,

> training, or education" in that field, as is required by section 90.702. Alford. Although claimant objected at deposition to Dr. Conant's lack of expertise to offer an opinion, she made no such objection during the deposition of Dr. Arpin, and thus failed to preserve the issue for appellate review in regard to Dr. Arpin's testimony. Preservation of error in this case is governed by Florida Rule of Civil Procedure 1.330(d)(3)(A), which requires an objection to an expert's qualifications, under circumstances such as those at bar, to be made during the deposition.
>
> We conclude, therefore, that the JCC erred in relying upon the expert testimony of Dr. Conant, but properly relied, under Alford, on the opinion of Dr. Arpin in denying the claims for continuation of chiropractic care, as we must assume that she was fully qualified to testify about chiropractic medicine.

Id. at 87 (emphasis added). *See also Clairson Int'l v. Rose*, 718 So. 2d 210, 213 (Fla. 1st DCA 1998).

If the defense attorney fails to qualify his or her own expert at a deposition, think twice about objecting to that expert's deposition being read at trial. The oldest Florida case on the point reversed a trial judge for sustaining a Plaintiff's trial objection to deposition testimony of a defense doctor on the ground that the Defendant failed to elicit his qualifications at the time of the deposition:

> It is quite clear that the objections were not made and sustained by the court on the ground that the deposition positively showed that the doctor was incompetent to testify, but rather on the ground that it did not show definitely and clearly that he was competent to testify. ***If these objections had been made at the time of the***

> ***taking of the deposition*** or even at some later date during the two and a half years they were on file in this cause prior to the trial, ***the defendants might have been able to obviate or remove the grounds for the objections by offering proof of facts which would have shown the competency of the witness*** in these particular matters, or a hypothetical question might have been framed.

Evans v. Perry, 161 So. 2d 27, 30 (Fla. 2d DCA 1964)(emphasis added).

This body of law may help if you have doubts about your expert's qualifications. You might want to think about avoiding reference to those qualifications during his or her deposition and hope that the defense does not object to your eliciting opinions without laying the foundation with proof of the expert's education, training and experience. This, of course, would be a risky course of action, but one to consider in the proper case.

We all need to make sure to raise objections to the defense experts' lack of qualifications at the time of the depo, in light of the foregoing authorities.

Conclusion

There I go again, shattering another "Courthouse Legend"; this one, that only objections to the form of the question need to be raised at the time of taking a deposition. It is impossible to learn everything about how to try a personal injury case, but we all certainly do have to . . .

Keep Tryin!

Roy

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